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ECONOMIC AFFAIRS COMMITTEE

Committee to Evaluate Effects of Supreme Court Rulings on Occupational Disease Laws...At its March 11 meeting, the Economic Affairs Interim Committee began wrestling with the effects that Montana Supreme Court rulings have had on the Occupational Disease Act. The meeting also featured discussions about the financial needs facing Montana entrepreneurs. Committee staff presented several options for dealing with the Court decisions. Representatives of the insurance industry and claimants' attorneys also discussed the effects of the decisions. The committee asked staff for additional research, including an analysis of potential costs and unintended consequences, on the following options:

- merging all or a portion of the Occupational Disease Act (Title 39, chapter 72, MCA) with the Workers' Compensation Act (Title 39, chapter 71, MCA); and
- revising only those parts of the Occupational Disease Act that the Supreme Court has identified as having legal problems.

Information on the Supreme Court decisions related to the OD Act is under Meeting Materials on the Economic Affairs Committee website: http://leg.mt.gov/css/committees/interim/2003_2004/econ_affairs/default.asp.

Attorney Larry Jones of Liberty Northwest also asked the committee to clarify a Supreme Court decision regarding whether ski instructors who are skiing before they start teaching a class are considered to be employed during that time or on their own time. The question involves a series of exclusions to the definitions of workers and to the Workers' Compensation Act that the committee will examine at its May 5 meeting.

Looking for Economic Development...Sen. Jerry Black of Shelby and fellow promoters of the Golden Enterprise Facilitation Program discussed business development in Montana. The facilitation program works with existing and start-up

businesses in Toole, Pondera, Teton, and Glacier counties and in the Blackfeet Indian Reservation. They said that networking is important to the facilitation program and also is considered one way in which the state might encourage networks of "angel" investors. Angel investors typically are able to put tens of thousands of dollars into a company in the hope of a big future payoff. They are usually interested in hands-on work with the company's owners. Gary Bloomer from TechRanch also discussed angel investors and gave examples of what other states are doing to encourage angel investing, including general tax credits or tax credits based on a percentage loss of investment.

Carroll South, executive director of the Board of Investments, told the committee that the state makes equity investments through Adams Street Partners but cannot use the coal tax trust fund for such investments. Although the board sometimes asks Adams Street to consider investing in Montana businesses, the firm has not yet judged the return on investment better here than elsewhere. A representative of Adams Street will speak at the committee's May 5 meeting.

Not all Companies Give a Crackerjack Prize...Dave Bayless discussed the different stages and conditions of entrepreneurial growth. Bayless, a former principal in a private equity firm in Texas who came back to Montana to start the Pioneer Entrepreneurs network, said that entrepreneurial growth companies (those capable of generating a boost to a local economy with more than four or five jobs) generally are found in urban areas. Yet local conditions can overcome that urban advantage, he said, noting that a business with good ideas can flourish anywhere, but that financing growth in the company may be difficult in more rural areas.

Reality Checks...Andrew Field, founder and president of PrintingForLess.com, a Livingston company featured in Inc. Magazine, and Tom McMakin, former chief operating officer of Great Harvest Bread Co., discussed Montana's gaps in capital assistance. Field emphasized the usefulness of such programs as the Community Development Block Grant program. He also said that he has hired many graduates with a combined business and information technology degree from Montana State University-Bozeman. Field said that mid-range funding of around \$500,000 to \$1 million was a problem for young, knowledge-intensive firms like his that are trying to grow but for which bank debt is not realistic. These type of firms would be able to expand, he said, but are unable to compete for funds from venture capitalists who are unlikely to spend time on deals of less than \$5 million.

McMakin, who is organizing a venture capital firm for so-called late-stage start-ups (with at least \$7 million in revenues), discussed the need for various levels of assistance that meet differing financial requirements of technology and nontechnology firms at different stages of growth. He said that early-stage companies would benefit from a "home-grown" network of investors and suggested that Montana help build a bridge between existing companies and their need for capital. McMakin said that a working group will put together more specific recommendations on how the state can help entrepreneurs for the committee's May 5 meeting. (The working group meetings are listed on the committee's website).

Ideas Galore...Other speakers described various requirements and opportunities for economic development:

- Economic developers John Kramer and Liz Harris discussed the importance of educating Montanans and outside businesses of the opportunities in the state and the availability of equity assistance. This information can be used to encourage companies to move here.
- Tony Rudbach of the University of Montana described the benefits of public funding for university research. More money into research would attract more financial resources from out-of-state, he said. He also noted that the constitutional ban on certain equity investments by the state should be reevaluated. The ban prevents universities from having equity stakes in research projects.
- Larry Hall of S&K Electronics, which has licensed two patents developed at the University of Montana, said assistance from the state's university system has been critical for S&K Electronics. The assistance has led to work with the National Aeronautics and Space Administration and the Department of Defense.
- Jon Marchi of Glacier Venture Fund noted that the two venture funds that have invested in Montana so far are either fully invested or almost so. His firm alone has requests from 88 entrepreneurs, evidence of funding needs above \$250,000.
- Keith Colbo, representing Montana's independent bankers, said the banking industry sees value in venture and angel investments. These types of investments may help companies obtain financial assistance from banks in the future.

Next Meeting in May...The Economic Affairs Committee is scheduled to meet on May 5 in Room 137 of the state Capitol. For more information about the meeting or the committee, please visit the committee's website under <http://leg.mt.gov/css/default.asp> and follow the "Committee" links. Or contact Pat Murdo, committee staff, at (406) 444-3594 or pmurdo@mt.gov.

ENERGY AND TELECOMMUNICATIONS COMMITTEE

Committee Meets in March...The Energy and Telecommunications Interim Committee met on March 25 in Helena. Materials for the meeting and other information may be viewed on the committee's website. To get to the website, type "<http://leg.mt.gov>," click on "Committees," then click on "Interim." Scroll down to

view the March meeting materials. Contact Mary Vandembosch at (406) 444-5367 or mvandembosch@mt.gov for more information or to be added to a mailing list.

REVENUE AND TRANSPORTATION COMMITTEE

Committee to Meet in April...The Revenue and Transportation Committee is meeting on April 30 at 9 a.m. in Room 102 of the state Capitol. The committee's agenda covers a variety of topics including:

- SJR 29 study of the taxation of electrical generation property;
- general fund collection report;
- update on committee's procedure to review agency-proposed legislation;
- property taxation of class eight business equipment--trends, interstate comparisons, and legal analysis related to exempting class eight property;
- report on the activities of the Western Transportation Institute;
- MDT updates on highway safety and federal reauthorization legislation.

In the Loop...For more information about the committee, its work plan, or agendas, please visit the website (<http://www.leg.mt.gov> and follow the "Committees" links), or contact Jeff Martin at (406) 444-3595 or jmartin@mt.gov or Leanne Kurtz at (406) 444-3064 or lekurtz@mt.gov.

LAW AND JUSTICE COMMITTEE

Committee to Look at Creating a Public Defender Agency...At its meeting in Livingston on March 22, the Law and Justice Interim Committee voted unanimously to draft a committee bill that would establish a state public defender agency. A subcommittee was appointed to prepare the draft for the full committee's review at a later meeting. The subcommittee members are Sen. Dan McGee (chairman), Sen. Gary Perry, Sen. Mike Wheat, Rep. John Parker, and Rep. Jim Shockley.

A 2002 class action lawsuit by the ACLU has highlighted the concerns about the public defender system's inadequacies and has engaged the state in a costly legal battle. Attorney General Mike McGrath told the committee that he would like to settle the lawsuit without extended litigation and additional costs.

The decision to pursue a state public defender agency followed a full day of testimony and discussion of three basic options for dealing with concerns that the current structure and funding of indigent defense services is inadequate. Currently,

counties determine how services are delivered and may establish county public defender offices, contract for services, or rely on judges to appoint counsel on a case-by-case basis. The state reimburses counties for public defender office costs incurred in district court cases and pays contracted and appointed attorneys in district court cases directly. There are six county public defender offices in the state (Missoula, Cascade, Anaconda-Deer Lodge, Gallatin, Yellowstone, and Lewis & Clark counties). The state has paid more than 180 contracted or appointed attorneys for services since July 1, 2003. Court-appointed attorneys may be compensated up to \$60 an hour for their services. The committee considered the following three options:

- do not change the system until there is more information and more fiscal experience with the state's recent assumption of district court costs;
- develop a hybrid system in which the state would coordinate contracting for services in counties without a public defender office; and
- establish an independent state agency with a chief public defender to coordinate services statewide and make county public defender offices part of the new state agency.

Because county public defender services involve justice courts as well as district courts and because many district court cases begin in justice court, the committee decided that it would also consider the assumption of public defender services not only in district court cases but in justice courts as well. The committee requested that staff conduct a survey of counties to determine how much each county budgets and expends for indigent defense.

Cost Analysis...A Legislative Fiscal Division report showed that 82% of the variable costs in the judicial branch expenditures for variable costs within the District Court Program is for indigent defense (the report is available on the committee's website). From July 1, 2003, through December 31, 2003, expenditures on indigent defense amounted to \$2.6 million. The report also showed that total expenditures for indigent defense in fiscal year 2004 are projected to reach \$7.8 million. Court-appointed counsel account for 51% of the total cost; county public defender offices account for 26%; contracts with attorneys account for 10%; and other expenses, including investigators, transcripts, witness fees, and medical evaluations, account for 13%.

Public defender costs are driven by case complexity and hours required to handle a case. Concerns about quality of services arise when public defenders also handle a private practice caseload where hourly rates exceed the \$60 maximum allowed for an indigent defendant's case. There are also concerns about how to control costs. In the current system, the state must pay the actual costs of county public defender offices and the hourly rate set by the judge or in a county contract. Testimony provided by the chief public defenders from Wyoming and Colorado, states which have a statewide public defender system, indicated that having state salaried staff can reduce

costs and help stabilize volatile expenses while also assuring supervision and enforcement of quality of service standards.

Caseloads...Counsel may be appointed for indigent defendants or respondents in criminal cases, abuse and neglect cases, juvenile delinquency proceedings, and involuntary commitment proceedings for mental illness. A review of caseload data showed that in fiscal year 2003 31% of all district court cases fell into these case type categories and amounted to 11,655 cases. A national statistic shows that at least 80% of these kind of cases involved indigent defendants or respondents. If that number is any guide in Montana, the total public defender caseload in FY 2003 can be estimated to have been 9,324 cases.

Caseload standards endorsed by the American Bar Association provide that a public defender should not be assigned more than 150 felony cases in a year. Applying that standard across the board, because the vast majority of the public defender cases are criminal, one could extrapolate that about 62 full-time state public defenders would have been needed statewide in FY 2003 to handle the caseload. There are about 35 public defenders in county public defender offices who handle a mixed caseload of district court and justice court cases. Data are not available on the justice court caseload. To assist the subcommittee in developing legislation for a state public defender agency, staff will conduct a more comprehensive survey of caseloads.

The subcommittee will meet between regular committee meetings to work out the details of Public Defender Commission membership, the appointment process and duties of the chief public defender, whether indigence should be defined in statute, and other details. The subcommittee will present the bill to the full committee for consideration and further discussion before the legislation is given a green light.

For more information, contact Sheri Heffelfinger at (406) 444-3596 or visit the committee's website.

CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES COMMITTEE

SJR 11 Study and HJR 3 Study Slated for April Meeting...The Children, Families, Health, and Human Services Interim Committee will meet April 29 and 30, in Room 137 of the Capitol.

The committee will continue its SJR 11 study on substance abuse prevention, treatment, and control. On April 29, the National Conference of State Legislatures will provide technical assistance on substance abuse treatment, treatment financing, treatment courts, and treatment for co-occurring disorders. One or more proposals are being developed and refined to create greater statewide coordination in substance abuse prevention. The proposal would change existing agency infrastructure to enhance integration and leadership in substance abuse prevention.

On April 30, the committee will try to wrap up its HJR 3 study on indigent defense for child abuse and neglect proceedings in order to send a recommendation to the Law and Justice Interim Committee, which is studying the public defender system in Montana. Staff will prepare an issues and options paper for consideration.

The Department of Public Health and Human Services will report on public health changes, responses to bioterrorism, the Travis D settlement, and the Public Health Advisory Council.

An agenda and meeting materials will be available on the committee's website by mid-April. If you need more information or wish to be placed on the interested persons list, contact Susan Byorth Fox at (406) 444-3597 or sfox@mt.gov.

Committee to Meet in June...A meeting that had been scheduled for May will be postponed until June. The Committee is considering meeting June 10 and 11, but will set the date in April.

LEGISLATIVE FINANCE COMMITTEE

March Meeting Covers a Wide Variety of Topics...The Legislative Finance Committee (LFC) met on March 11 and 12. The committee had a busy agenda, which included reports on various fiscal issues, the highlights of which follow. The agenda, most of the reports presented at the meeting, and other information about the committee are available on the Legislative Fiscal Division website at <http://www.leg.mt.gov/css/fiscal/lfc.asp>. For further information, contact Clayton Schenck at cschenck@mt.gov or at (406) 444-2986. For information regarding specific reports, ask for the analyst who prepared the report.

2005 Biennium Budget Spending "Pressure Points"...Several areas of the budget could experience funding shortfalls that may require supplemental funding by the Legislature, thus reducing the general fund balance. The estimate of K-12 supplemental costs to meet all Base aid requirements now stand at \$7.9 million, while costs in the District Court Assumption Program in the judiciary are expected to exceed the appropriation by between \$4.8 and \$6.8 million. Department of Corrections costs remain a concern because of increased prison population, while significant changes in the developmental disabilities service delivery system could put additional pressure on expenditures in human services. For further information, contact Taryn Purdy at tpurdy@mt.gov or at (406) 444-2986.

General Fund/Federal Funds Update: 2005 Biennium Projected...Based on data through the end of Feb. 2004, total general fund revenue is expected to be \$35.4 million less than estimated by the Legislature in 2003. Although the outlook for some revenue categories has worsened since December, the overall general fund revenue picture has improved by about \$12 million. Corporation income taxes, US mineral royalty revenue, and individual income taxes have changed significantly since December.

Corporation income taxes are expected to be below estimates because of significant refunds and the impacts of the accelerated depreciation legislation enacted at the federal level. Some refunds are due to the economic slowdown while others are due to carry-back capital losses. The refunds and the impacts of federal legislation make it nearly impossible to assess the underlying growth of corporate taxable income in Montana. Without information to establish a clear trend, corporation income taxes are expected to remain relatively constant throughout the biennium. Information from corporate tax returns filed by May 15 may provide insight on future corporation tax trends for fiscal year 2005 and beyond. If corporate profits in Montana follow national trends, estimates from corporation income taxes may be revised upward at a later date.

US mineral royalty revenue collections have exceeded estimates because of higher oil and gas prices and an "apparent" increase in coal production on federal lands. To assess trends for this source, commodity price and production information is required to develop a revised estimate. Because this information is maintained on a federal computer system that has had significant problems, the availability of timely and accurate data is difficult to obtain. In addition, coal production on federal lands in Montana may have been over-reported. As more detailed information becomes available from the federal Mineral Management Service, there is a high probability that the estimate from this source will be revised downward.

Total individual income tax collections before refunds have improved by almost two percentage points since November. However, refunds in December, January, and February of this fiscal year have increased by over eight percent from the same period last fiscal year. Because March, April, and May are typically the higher refund months, refunds during these months will indicate whether collections will be consistent with current forecasts. More electronic filings and the short turnaround time to process refunds may explain the current acceleration in refunds. If refunds continue to accelerate, the estimate from this source may be revised downward.

In addition to negative revenue adjustments of \$35.4 million, general fund supplemental appropriations for public schools and district court assumption are estimated to be \$12.7 million. Although supplemental appropriation needs are a concern in other areas of government, data is insufficient to prepare an accurate estimate at this time. The December status report also indicated the FMAP funds available would be \$19.0 million. Based on calculations by the Department of Public Health and Human Services, this amount has been revised downward by \$5.0 million.

State wildfire costs for the 2003 season have been revised upward to \$31.7 million. All of these costs are funded from the \$50 million grant that Montana received under the federal Jobs and Growth Tax Relief Reconciliation Act. As previously reported, state wildfire costs for the 2004 season are estimated at \$7.0 million, which was based on a five-year average over the period 1998 through 2002. However, fire managers at the National Interagency Fire Center in Boise, Idaho, are suggesting that drought, warm temperatures, and damaged vegetation are pointing to another difficult fire season through many parts of the West including the Rocky Mountain Region. The probability that the 2004 fire season will be greater than \$7.0 million is high.

Based on the major adjustments identified above, the general fund balance is expected to be \$38.7 million by the end of the 2005 biennium, or \$7.5 million less than

estimated by the 2003 Legislature. The projected balance does not include any of the \$50 million federal grant. Of that amount, \$31.7 million has been allocated for state wildfire costs for the 2003 season, \$11.1 million has been allocated for the governor's spending proposal, and \$ 7.2 million has not been allocated. For further information, contact Terry Johnson at tjohnson@mt.gov or at (406) 444-2952.

Capital Project Fund...Staff presented a follow-up report related to the shortfalls in the Capital Project Fund covered at the December meeting. The report included the response of legal staff to several questions raised at the December meeting. The following opinions were discussed:

- It is permissible for the state of Montana, as trustee for the capitol building land grant trust lands, to use the money for capitol complex maintenance and improvements.
- The condition contained in HB 5 to allow the phase-in of the projects as capitol land grant revenue becomes available applies to both projects in question. However, the condition may be unnecessary because 17-7-212, MCA, allows any unspent capital appropriation to continue until the project is complete.
- It is not illegal to have a negative fund balance at the end of a fiscal year, but it is illegal to have a negative cash balance.
- Under the clear language of 77-1-109(3), MCA, in any fiscal year, the Department of Natural Resources and Conservation is prohibited from diverting more than 10 percent of the previous fiscal year's revenue, and the department's practice of diverting prior year revenue is in violation of the statute.
- Current accounting practice requiring capitol land grant revenue to be deposited in a capital projects fund and the statutory diversion for resource development are not in conflict with the requirements of 18-2-107, MCA.

Following the discussion of the legal issues, suggestions to enhance the Legislature's role in tracking the appropriation process of the Capital Project Fund were discussed, but the committee took no formal action. For more information, contact Roger Lloyd at rlloyd@mt.gov or Cathy Duncan at cduncan@mt.gov or either at (406) 444-2986.

District Courts Statewide Assumption Project Fiscal Update...Senate Bill 176, enacted in 2001, made district courts a part of the state judicial branch and required state funding of district courts, except for clerks of court, beginning July 1, 2002. The counties previously funded district court costs. The state also pays all the costs for indigent defense. Indigent defense costs comprise over 80 percent of the District Court

Statewide Assumption Project's total variable costs. (See Law and Justice Committee, p. 4, for related coverage.)

Based upon current and projected expenditures through the remainder of the fiscal year, the judiciary predicts that it will experience approximately \$3.4 million in cost overruns during fiscal year 2004. The judiciary expects that it may be able to partially mitigate this overrun in two ways. First, the judiciary may be able to reduce spending for operating costs by \$0.5 million. Second, the judiciary expects to use \$1 million in 2003 biennium general fund reversions as approved in an appropriation for the 2005 biennium. However, the use of reversion amounts is a short-term solution to cover part of the cost overrun. If these shortfalls are not permanently mitigated, it is reasonable to expect that they will also appear in similar magnitudes in fiscal year 2005. The range of the potential overrun for the biennium is between \$4.8 and \$6.8 million.

There are several factors within the program that may be contributing to the cost overruns: the number of FTE on staff, the cost of personal services, the amount paid for attorney and evaluation services, and growth in caseload. LFD staff is reviewing these costs and areas of concern. For further information, contact Harry Freebourn at hfreebourn@mt.gov or at (406) 444-5834.

2007 Biennium Statewide Information Technology Plan...Staff presented a report on the update to the state information technology strategic plan. The Montana Information Technology Act (Title 2, chapter 17, part 5, MCA,) requires biennial updates to the state IT strategic plan and presentation of the update to the finance committee before it is finalized. The presentation and committee discussion with staff and the state's chief information officer focused on issues contained in the plan that imply a fiscal impact. The issues addressed include: (1) business planning; (2) data management; (3) personnel maintenance; (4) centralization versus decentralization; and (5) outsourcing versus using existing state information technology resources. The committee directed staff to evaluate options for formalized business process reviews and present the findings to the committee. The report on the update to the strategic plan is available from the Legislative Fiscal Division or on the legislative website under the fiscal staff reports menu.

Brian Wolf, the state's chief information officer, reported on the status of various major information technology development projects. Wolf discussed projects that were not proceeding as planned or that had identified risks. Wolf also reported on the Department of Revenue's project to replace the POINTS system. He said that the new system (Integrated Revenue Information System) is proceeding ahead of schedule and under budget. For further information, contact Greg Dewitt at gdewitt@mt.gov or at (406) 444-5392.

Developmental Disabilities Program...Staff discussed a report on emerging issues within the developmental disabilities service delivery system and the status of the Eastmont facility in Glendive. Emerging issues impacting this service delivery system include: development of an assessment tool, uniform rate structure, and provider reimbursement methodology; settlement of the class action litigation known as Travis D.; and changes in client service needs and how services are provided. The report is on

the LFD website noted on p. 7. For further information on this report please contact Pat Gervais, senior fiscal analyst, at pagervais@mt.gov or (406) 444-1795.

Medicaid and Medicaid Redesign The LFC took two actions as the result of a staff report on selected Medicaid topics. The committee requested that staff work with the Department of Public Health and Human Services (DPHHS) to prepare draft amendments to 53-6-110(4), MCA, that requires the department to submit Medicaid estimates, whenever such estimates are prepared, to the LFC for review at its next meeting. The wording of the requirement is difficult to interpret and potentially unenforceable because it is vague as to when estimates are to be provided.

The LFC also requested that DPHHS articulate the over-arching public policy regarding provision of Medicaid services in its report on the Medicaid Redesign project (in response to HJ 13 passed by the 2003 legislature). The articulation of the public policy guiding eligibility for services and services provided in the Medicaid program was considered by the Health and Human Services Joint Appropriation Subcommittee during the 2003 session. For further information, contact Lois Steinbeck at lsteinbeck@mt.gov or at (406) 444-5391.

Montana Law Enforcement Academy Funding... Staff presented a report on a funding shortfall at the Montana Law Enforcement Academy as a result of revenues into the MLEA state special revenue fund not meeting projections. Department of Justice staff said that plans were being developed for short-term and long-term mitigation of the shortfall. LFD staff will provide an update at the June committee meeting. For further information, contact Todd Younkin at tyounkin@mt.gov or at (406) 444-2722.

Interim Work Plan Projects... Staff gave updates on two major projects. The first project will provide the Legislature with information that will enable it to more consistently prioritize state government programs, and the second will determine whether, on a long-term basis, revenues and expenditures are in structural balance. The purpose of each project is to show long-term trends and challenges and to assist the Legislature in responding to those challenges. The results of both studies will be presented at the June LFC meeting.

STATE ADMINISTRATION AND VETERANS' AFFAIRS COMMITTEE

Subcommittee to Examine Highway Patrol Recruiting... The State Administration and Veterans' Affairs Interim Committee last met on Jan. 23. See the February issue of **THE INTERIM** for coverage of the meeting. Additional information is available on the committee's website.

At the January meeting, the Montana Highway Patrol again reported on the continuing, significant challenges in recruiting and retaining qualified candidates for MHP officer positions. Col. Shawn Driscoll, then-chief of the MHP (he has recently

retired), briefed the committee on pay differentials between MHP officers and local law enforcement officers in various Montana counties. Following Col. Driscoll's presentation, the committee formed a subcommittee to study the problems of recruiting and retaining qualified MHP officers. The members of the subcommittee are: Rep. Stan Fisher, chair, (R-Bigfork); Sen. Kelly Gebhardt (R-Roundup); Rep. Larry Jent (D-Bozeman); and Rep. Ralph Lenhart (D-Glendive).

Chairman Fisher has asked the Montana Department of Justice, of which the MHP is a division, to present a detailed analysis of the problems and a detailed plan of action for consideration by the subcommittee. The subcommittee is scheduled to meet on Tuesday, April 13 in Room 102 of the Capitol. The agenda for the meeting, as soon as it is set, will be posted to the subcommittee's portion of the committee's website.

Committee to Meet in June... The next meeting of the full committee is scheduled for June 10 and 11 at the Capitol. In addition to updates from various executive branch agencies, the committee will also review proposals for legislation requested by the state agencies for which the committee has monitoring responsibility and from other stakeholders whose issues fall within the committee's purview. These issues include any of the state's retirement systems, pay and benefit systems, public employee work rules, and the like.

For additional information about the committee or the subcommittee, contact Dave Bohyer by phone at (406) 444-3064 or by e-mail at dbohyer@mt.gov.

SJR 32 SUBCOMMITTEE ON MEDICAL LIABILITY INSURANCE

Subcommittee Identifies Problems and Options... The SJR 32 Subcommittee, created by the Legislative Council and commissioned to study medical liability insurance, met on Jan. 15. After receiving additional testimony from insurers, medical providers, medical facilities, persons injured through malpractice, and others, the subcommittee held an executive work session.

The session resulted in, among other things, directions to staff to compile and list the range of perceived problems and possible solutions for further research, analysis, and consideration. The list, which will likely change from time to time, was distributed to subcommittee members and posted to the subcommittee's website for review by stakeholders.

During January and February, subcommittee members identified their individual priorities from the list and forwarded them to staff. Staff compiled and summarized the members' priorities, disseminated the results to members and stakeholders, and posted the results to the subcommittee's website under the title "*List of Options*" Survey Results. The results of the survey were discussed at the subcommittee's March 25 and the outcome of the meeting and any recommendations will be reported in the May issue of **THE INTERIM**.

Subcommittee Will Meet in June...The subcommittee's next meeting is scheduled for Tuesday, June 22 at the state Capitol. A summary of previous meetings is also available on the subcommittee's website through the agendas and minutes of the meetings. Please check the website periodically for more details of the subcommittee's meetings, past and future. You may also contact Dave Bohyer, subcommittee staff, at the Legislative Services Division by phone at 444-3064 or by e-mail at dbohyer@mt.gov.

STATE-TRIBAL RELATIONS COMMITTEE

Committee Meets in Helena...The State-Tribal Relations Committee met in Helena on March 5. The committee heard presentations from the Board of Pardons and Parole, the Department of Labor and Industry, the Office of Public Instruction, and the Office of the Commissioner of Higher Education.

American Indian Inmates in Prison...Craig Thomas, executive director of the Board of Pardons and Parole, discussed the provisions of HB 211 that require board members to receive training on American Indian culture and problems. The purpose for the training is to ensure that the board deals appropriately with American Indian inmates applying for parole. HB 211 also requires the board to provide a report to the Law and Justice Committee on the disposition of parole applications made by American Indians, including the reasons for approval or denial of parole, for the period of January 1, 1999, through March 31, 2004.

Currently, the board has two American Indian members, one regular and one auxiliary. One other regular member and three auxiliary members have knowledge of American Indian issues. The board is in the process of adopting an administrative rule on board training. The proposed rule lists the kinds of information that must be included in the training. A member who has not received training may not participate on a hearing panel acting on American Indian offender dispositions unless a trained member is also on the panel. The board will act on the rule within the next month. In response to a question, Thomas said that a training curriculum has not yet been adopted. Each member's background and training will be evaluated to determine the type of training that is needed. The Department of Corrections wants to implement similar training for all of its employees; the board hopes to coordinate its training with the department's. The committee asked for a report on the comments received by the board on the proposed administrative rule and a report on the training curriculum after one has been adopted.

Thomas told the committee that the report on the disposition of American Indian applications for parole may be problematic for the board to produce, primarily because the reasons for approving or denying parole were not previously recorded. However, the reasons are now being recorded. Thomas also pointed out that American Indian inmates "self-identify", so it is possible that not all Indian inmates will be accounted for in the report. Thomas said that each case is judged on its own merits. The

nature of the offense is the most important factor in parole decisions, but the number and pattern of offenses are also considered. The board will provide the report to the Law and Justice Committee this summer.

American Indian Unemployment Information...The federal Bureau of Labor Statistics, which reports unemployment statistics in America, uses a formula different from the formula used by the Bureau of Indian Affairs in determining the unemployment rate on Indian reservations. As a result, Indian tribes believe that Bureau of Labor Statistics under-reports the actual unemployment rates on reservations and does not provide an accurate picture of the situation. In House Bill No. 2, the Legislature directed the Montana Department of Labor and Industry to disseminate the BIA unemployment statistics through the department's website or in its official publications. The department has put the information on its website.

Ingrid Childress, Department of Labor and Industry, showed the committee how to access the information on the website. The information currently on the website comes from the BIA regional office in Billings, so it only covers six of the seven reservations in Montana. The Confederated Salish and Kootenai Reservation is in the Portland, Oregon region. Information for this reservation will have to come from that office. The Department of the Interior's website is shut down due to security issues stemming from the Cobell lawsuit over Indian trust accounts, so the unemployment information is not yet available electronically. DLI has had to request the information on paper, which has taken some time. The BIA report is done every two years, and the next report is due this summer. To access the information, go to www.dli.mt.gov. Follow the "Media and Publications" link and click on the "Resource Articles" tab.

Childress asked the committee for guidance on other ways to disseminate this information. Committee members suggested that the information be included in department newsletters on a regular basis and in press releases dealing with unemployment in Montana. The committee would like to see the BIA information integrated with the department's information, not presented separately. Because the Bureau of Labor Statistics' formula is the federal standard, it would take congressional authorization to change the formula. The department is willing to work with the Montana congressional delegation on changes; the committee agreed to work with DLI on this issue.

Indian Education...Lynn Hinch, Office of Public Instruction, reported to the committee on the work of the Indian Education for All Committee of the Board of Education. The major problem is finding ways to measure how well school districts are implementing Indian Education for All. OPI received \$50,000 from the governor last summer, as part of the federal money that came to the state. OPI is using that money for curriculum development that will assist districts in the implementing the program.

Ellen Swaney, Office of the Commissioner of Higher Education, provided information on Indians enrolled in higher education in Montana. Indians account for about 3% of the total higher education student population; that percentage has remained fairly constant over the last few years. The university system wants to increase that percentage to 6-7%, which is the percentage of Indians in the general Montana

population. Ms. Swaney also explained how the Indian fee waiver works. Students must demonstrate financial need, have at least one-quarter Indian blood, and be a Montana resident for at least one year prior to enrollment. About 60% of Indian students are eligible for the waiver. The fee waiver does not waive all of the tuition.

Lori Falcon, OPI, gave an update on her work with OPI's Dropout Prevention Project. She also provided the committee with results of a survey of high school seniors in the project high schools on why they stayed in school. The survey results also include recommendations for helping students stay in school.

Staff gave a progress report on the dropout prevention study (HJR 8). Staff is gathering information on model programs and effective practices for dropout prevention. The committee will hold a public hearing on the study on Saturday, April 3 in Missoula in conjunction with the Montana Indian Education Conference.

Reservation Visit Planned... Committee staff is arranging a visit to the Northern Cheyenne Reservation in May. This will be the committee's second reservation visit this interim.

For further information about the meeting or the HJR 8 public hearing, please contact Connie Erickson at (406) 444-3078 or at cerickson@mt.gov. Information is also available on the Legislative Services Division's website at www.leg.mt.gov. Just follow the links to the State-Tribal Relations Committee.

ENVIRONMENTAL QUALITY COUNCIL

Environmental Quality Council... The EQC subcommittees meet on March 9 (see below for coverage) and the full EQC met on March 10. The EQC reviewed and discussed water banking, the Total Maximum Daily Load (TMDL) program, surface water/ground water connectivity, and funding alternatives for the water rights adjudication program.

Just before the meeting, the Montana Association of Conservation Districts sent a letter to the EQC that was critical of the Department of Environmental Quality's decision to proceed with TMDL development with less emphasis on public participation in order to meet a court imposed deadline for the completion of TMDLs. The EQC discussed the plan for completing TMDLs and the conservation districts' criticism of the process. The EQC will consider TMDLs again in July.

With regard to water banking, the EQC discussed the options for marketing water through temporary leases. The EQC reached a preliminary conclusion that water banking that requires storage capacity is not feasible and that other types of water banking are not needed at this time.

John LaFave, Montana Bureau of Mines and Geology, started off the discussion on surface water/ground water connectivity with an informative presentation on basic hydrology, how connectivity between surface waters and ground waters can be determined, and the cost associated with determining connectivity. Jack Stults,

Department of Natural Resources and Conservation, described how the department interprets and implements laws that limit new ground water development in closed basins if there is a "direct or immediate connection" between surface water and ground water. He also reviewed the requirement that a proposed ground water development cannot have an adverse impact on existing water rights. If it does, the DNRC will not process the permit request or issue a permit pending any administrative or judicial remedies that are sought by the applicant.

The EQC also discussed ways to fund Montana's water adjudication program. The EQC reviewed a flat fee per filed claim, a variable use fee based upon the beneficial use to which the claimed water is applied, and a hydroelectric tax. Following the review of alternatives, the EQC decided not to recommend any increase in funding for the adjudication program.

EQC staff summarized the public comments on the proposed concepts designed to deal with water rights and water use permits for artificial ponds and for the construction of artificial ponds in watershed basins that are closed to new appropriations. This topic will be considered at the May meeting.

Staff also provided a draft report on the status of metal mine bonding in Montana. There have been several changes in metal mine bond implementation and legislative policy following a previous recognition of problems with both. These problems resulted in some mine operations being insufficiently bonded. Some operations are, for different reasons, still insufficiently bonded. A final report is due in May.

Next Meeting in May... The EQC Energy Policy Subcommittee will meet on Wednesday, May 12, and the full EQC will meet on Thursday, May 13 in Helena. The Subcommittee on Agency Oversight is not scheduled to meet in May.

Reports, power point presentations, and other information presented to the EQC are available on the EQC website at http://leg.mt.gov/css/lepo/2003_2004/default.asp under "Staff Memos". If you have questions or want more information about water policy topics, please contact Krista Lee Evans, staff, at (406) 444-1640 or kevans@mt.gov

EQC Agency Oversight Subcommittee... The Agency Oversight Subcommittee met on March 9 in Helena and covered a wide range of topics. It discussed, without recommendation, the methods and relative merits of proposed cleanup standards and certification of the cleanup of property contaminated by methamphetamine labs. This problem cuts across the jurisdiction of the Department of Justice (DOJ), the Department of Environmental Quality (DEQ), the Department of Public Health and Human Services as well as local health, environmental, and law enforcement agencies. The subcommittee is searching for a low-cost cleanup procedure and policy that will satisfy the needs of property owners and provide for the health and safety of the public.

The Department of Natural Resources and Conservation and the Department of Agriculture presented environmental program compliance and enforcement reports as required by law.

Department of Fish, Wildlife, and Parks described the efforts to propose rules to implement laws for commercial wildlife operations including shooting preserves, zoos, and menageries, and proposed rules for a possible bison hunt.

The DFWP and the DOJ Motor Vehicle Division explained how they are implementing the collection of the new \$4 vehicle registration fee for state parks access. They noted that the mail-in registration cards do not contain information that the fee is optional or how one could opt-out of the fee.

The DEQ is proposing new rules to control how septic tank and pit privy wastes must be handled if they are disposed of on land instead of in a wastewater treatment facility. The subcommittee held an oversight review of the proposed rules and heard testimony from the department and the regulated entities.

As part of the EQC's review of statutory duties, DEQ presented an update of the state solid waste management plan and a review of the statutory requirements for a mega-landfill permit.

For further information on subcommittee activities, contact Larry Mitchell, staff, at (406) 444-1352 or lamitchell@mt.gov, or visit the subcommittee website at http://www.leg.mt.gov/css/lepo/2003_2004/subcommittees/agency_oversight/default.asp

EQC Energy Policy Subcommittee...The Energy Policy Subcommittee met on March 9. The subcommittee heard four panel discussions on the barriers and opportunities for the development of wind, hydrogen, ethanol, and biodiesel alternative energy resources. The subcommittee evaluated various funding options for providing incentives for the development of alternative energy resources. The subcommittee requested the following information for the May 12 subcommittee meeting:

- an analysis of the implementation of the ethanol tax incentive;
- an analysis of Nebraska's per gallon production incentive for ethanol;
- an explanation of the state bonding process and how it works; and
- a bill draft that clarifies that alternative energy projects are eligible for renewable resource and grant and loan programs.

The subcommittee is scheduled to meet on May 12 in Room 102 of the state Capitol. For further information on subcommittee activities, contact Todd Everts, staff, at 444-3747 or teverts@mt.gov or visit the subcommittee's website at: http://www.leg.mt.gov/css/lepo/2003_2004/subcommittees/energy_group/default.asp

Information Available on EQC Website...Minutes of past meetings, draft meeting agendas, reports, and other information about the Environmental Quality Council are available on the EQC website at <http://www.leg.mt.gov/css/lepo/>

[2003_2004/default.asp](http://www.leg.mt.gov/css/lepo/2003_2004/default.asp). You may also call (406) 444-3742 or send an e-mail message to eqc@mt.gov.

TIME AND TIDE

(Tempus fugit)

<u>Event</u>	<u>Days remaining</u>
Target date for completion of interim committee work (September 15, 2004)	168
General election (November 2, 2004)	216
59th Legislature convenes (January 3, 2005)	278

THE BACK PAGE

CHECKS AND BALANCES: A SEPARATION OF POWERS

By Susan Byorth Fox
Legislative Research Analyst

Occasionally, a legislator will call while traveling or sitting on a tractor and open the conversation with, "I've been thinking" Although I have not been traveling lately or sitting on a tractor for long periods of time, I've been thinking. The topic that I've been thinking about is one that interests me, and I see many examples that give me pause. The general theme is "separation of powers", which sounds simple, but the more I look at real situations, I'm not convinced it is well understood. I'd like to share my understanding and apply some related concepts as a point of reference to begin to discern the separation of powers.

Although separation of powers is implied and is an organizing principle in the U.S. Constitution, it is not stated explicitly. However, it is explicitly stated in our Montana Constitution:

The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted. (Article III, section 1)

There is a separation of power, but the branches are not totally separated; only the powers properly belonging to one branch must be separate and not exercised by another. It's about exercise of power, and a key to the understanding is in the word "person" as that who is exercising the power. Because that is where the rub lies, perhaps the concept of separation of "persons" is helpful.

The Montana Constitution provides:

No member of the legislature shall, during the term for which he shall have been elected, be appointed to any civil office under the state (Article V, section 9)

Although this provision speaks to an office, it helps us to know whether a person can serve in two "offices", especially in different branches. In State ex rel. Barney v. Hawkins, the Supreme Court provided a five-part test to determine whether an office is a civil office and described how to determine the status of the person in office. I think that these tests instruct us about separation of powers. The first test is whether or not a person has the power to exercise. If the office is created by the constitution, the Legislature, a municipality, or other body with authority from the Legislature, then one

has the power. The second test is that the office must possess a delegation of a portion of the sovereign power of government, and the third test is that the power must be granted and defined by the Legislature or legislative authority. The fourth test is that the duties must be performed independently and without control of a superior authority other than the law, unless placed under the general control of a superior officer or body. Finally, the office must have some permanency and continuity and not be only temporary or occasional. Independence and durability are indications of power.

With these concepts in mind, let's go back to the separation of power into three branches of government: the legislative, the executive, and the judicial. The Legislature enacts laws, the Executive Branch administers the laws, and the Judicial Branch interprets the laws when in dispute. The branches are separate and equal and provide a check and balance system of power in order that no one branch has the authority to run roughshod over the people. It may not be the most efficient form of government, but it is built to protect the public from tyranny.

The relationship between branches is one of interdependence in order to provide checks on each branch's power and to strive toward a balance. Each branch has a relationship and responsibility toward the function of other branches and limited authority to control certain aspects of the functions in a very prescribed manner. It appears to be a matter of timing. Appointment, authorizing language (i.e., laws), and appropriations are all indicators of the relationships with another branch, but after that contribution, the actual administration of each branch's power is kept separate. The judiciary, when asked, may review the law and its administration to determine its legality, and the cycle begins again.

The Legislature enacts laws, but the Governor is given the authority to sign or to veto a bill enacting a law, and then the Legislature has opportunity to override the veto. The Legislature passes the laws and appropriates the money, but then must stand back while the executive agencies administer the law unless someone asks the Judicial Branch to step in. The Legislature also delegates some of its authority to the executive for rulemaking, and once in the hands of the executive, the Legislature may comment but may not stop that authority from being exercised. Legislative intent may or may not be followed, dependent on the explicitness of that intent in the law and the interpretation by the administrators or arbiters. Succeeding Legislatures may respond in the form of a new law or change in law or by appropriation decisions. This tension is what provides the balance.

Real life situations bring out questions of the application of separation of powers. There has been occasion in legislative affairs to remind legislators that they do not have to do what the Governor or department director or advisory council wants or that they can attempt to change a law upon which the Supreme Court based its decision. It is the legislative prerogative to set public policy. During a legislative session, the Governor most certainly can bring the executive authority to bear by bringing its officers to testify for or against a measure to persuade or influence the Legislature. However, the

Governor may not exercise "power" until a bill sits on the gubernatorial desk. Legislative interim committees review executive rulemaking and are often frustrated by their inability to actually stop or change the rules unless the executive agency acquiesces in a nod to diplomacy. Legislators are reluctant to involve the Judicial Branch to aid them in their efforts and always have the option of changing the underlying law.

Another situation that brings this to mind is the common practice of legislators being asked to serve on advisory councils for Executive Branch agencies. The Executive Branch agencies seek input on their progress and in the development of proposals with the next legislative session always in mind. Legislators who care about certain areas of public policy can provide valuable information from their constituents across the state and about legislative realities.

If there is no direct sovereign power being exercised, there should be no violation of separation of powers. That is what "advisory" would imply. However, substitute with the concept of "separation of persons", and the conundrum is more clear. They are not in two civil offices at the same time; however, appointment may create internal conflicts if a legislator feels beholden to the agency when the issue is brought before the legislative body. If legislators are not clear in their role, they may not be able to feel so separate when they consider the issue. As no single legislator has the ultimate power to pass legislation alone, the executive is not usurping the legislative power, but the individual legislator may not see a line of "separation of power" any longer and may not provide the check and balance that is intended by the constitution.

The assignment through legislation of interim studies to Executive Branch agencies that include legislative members is another example in which the lines can blur. It is legitimate to want the executive who administers the programs and who possesses expertise in an area of public policy to perform the study and to participate as a valuable source of information; yet, the agency folk are beholden to their director and to the respective elected official in charge. Legislative members are beholden to their constituents and the public at large. It becomes a Legislative Branch issue when legislators seek additional information from legislative staff on the public policy issue being studied. It may be inappropriate if the information is provided in a manner that directs the policy decisions that could potentially compromise the legislators' or staff's ability to maintain independence when the policy decision comes before the Legislature.

An example from last session is illustrative of how easy it is to forget separation of powers. A Legislative Services Division legal opinion was rendered that the appointment of District Court Judges and legislators to the Montana Board of Crime Control was inappropriate based on separation of powers and the constitutional prohibition of legislators being appointed to civil office. The Board of Crime Control fulfilled the five-part test for determining a civil office in Barney discussed above. Both District Court Judges and legislators hold civil office in separate branches of government from the Board of Crime Control, an Executive Branch agency.

Other examples arise because of changes over time. The Department of Corrections has an annual budget of about \$6 million for prevention and for placement of juveniles into programs that are necessary for the requirements of Youth Court. Juvenile probation officers who need to use that money for the youth involved in Youth Court have been the employees of the Judicial Branch since 2001 and the state assumption of District Court costs. (The Department of Corrections had inherited the function when the Department of Family Services was dissolved.) Until 2001, juvenile probation officers were county employees. The current situation at least raises the question of whether the Judicial Branch that has now assumed the juvenile probation function from the counties should have funding for its programs funneled through an Executive Branch agency that determines the appropriate use of that money.

A politically sensitive point provides another opportunity to discern the issues involved in separation of powers. One of the explicit powers of the Legislative Branch is to appropriate money for public functions. The Legislature has statutorily authorize the Executive Branch to appropriate certain unanticipated money in the interim between legislative sessions through a budget amendment--a delegation of authority currently in law. The Legislative Finance Committee monitors this activity for the Legislature, but may not approve or disapprove amendments. In a Supreme Court decision, the court ruled that:

The power in question resides in either the legislative body while in session, or, if properly delegated, in an executive agency. State ex rel. Judge v. Legislative Finance Committee (168 Mont. 470(7))

An appropriation is an exercise of legislative authority, and through time, the courts have determined that it includes the discretion to dispose of unanticipated nongeneral fund revenue. Usually, unanticipated revenue comes with strings attached for programs that are already authorized, and the budget amendment provides the temporary appropriation to give the spending authority. The recent large amount of unanticipated revenue received by the state from the federal government, much of which came with few strings attached, may be unprecedented, and it may provide the opportunity to ask if the budget amendment laws contemplated a circumstance like this. The Legislature had the option of calling itself into a special session and chose not to. Therefore, the executive chose to use the delegation of legislative authority through the budget amendment process to appropriate the funds. It is complicated, and had there been opposing political parties in power or a greater divergence in philosophy, different decisions may have been made. It may be time to step back and see if the Legislature truly wants to delegate one of its primary powers so broadly.

A final analysis that may be of interest regards legislators who are employees of the Executive Branch itself. In discussion with staff from the National Conference of State Legislatures and other states, it has come to my attention that many states do not allow state employees to serve in the Legislature. In trying to apply the principles discussed above, it brings me back to the Montana Constitution, the definition and interpretation

of "civil office", and the five-part test. If a legislator fulfills duties that are performed independently and without control of a superior power, then the legislator may hold a civil office that would be constitutionally prohibited. However, if they are employees in a subordinate position and under control of a superior power, there should not be a conflict because they do not exercise the sovereign power of that branch of government.

None of these examples that I question necessarily has one clear-cut answer, but unless we engage in the conversation and test ourselves by analyzing these and other emergent situations, we lose the beauty and the strength of separation of powers between branches and the checks and balances that it can provide for the people of Montana.



INTERIM CALENDAR

UNLESS OTHERWISE SPECIFIED,
ALL ROOM DESIGNATIONS ARE IN THE STATE CAPITOL

APRIL

April 2, Local Government Subcommittee of the Education and Local Government Committee, Room 137, 1 p.m.

April 3, State-Tribal Relations Committee, public hearing on HJR 8 (dropout prevention study), Holiday Inn Parkside, Missoula, 1:45 pm

April 13, State Administration and Veterans' Affairs Subcommittee on Highway Patrol Recruitment and Retention, Room 102.

April 29, Children, Families, Health, and Human Services Committee , Room 137

April 30, Children, Families, Health, and Human Services Committee , Room 137

April 30, Revenue and Transportation Committee, Room 102, 9.a.m.

MAY

May 5, Economic Affairs Committee, Room 137

May 12, EQC Energy Policy Subcommittee, Room 102

May 13, Environmental Quality Council, Room 102

JUNE

June 10, State Administration and Veterans' Affairs Committee

June 11, State Administration and Veterans' Affairs Committee

June 22, SJR Subcommittee on Medical Liability Insurance